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MAR 17 '93 10:11 HHP DIVISION

No. 92-7944
A-698

IN THE SUPREME COURT OF THE UNITED STATES

SYVASKY LAFAYETTE POYNER, et al.,

Petitioners

v.

EDWARD W. MURRAY,
Director, Virginia Department of Corrections, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit and
Motion for Stay of Execution

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND OPPOSITION TO MOTION FOR STAY OF EXECUTION

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MAR 17 '93 10:11 AM DIVISION

No. 92-[illegible]
A-698

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CERTIFICATE OF SERVICE

I, Katherine B. Toone, a member of the Bar of this Court, certify pursuant to Rule 29.5(b) that copies of the Respondents' Brief in Opposition to Petition for Writ of Certiorari and Opposition to Motion for Stay of Execution and of the Respondents' Appendix were hand-delivered to Alexander H. Slaughter, Esquire, McGuire, Woods, Battle & Boothe, One James Center, 901 East Cary Street, Richmond, VA 23219, on March 17, 1993.

Katherine B. Toone
Assistant Attorney General

MAR 17 '93 10:11 AM DIVISION

QUESTIONS PRESENTED

[illegible] Court's authority of execution [illegible] prisoner who murdered five women in a span of eleven days, and who long ago exhausted his federal habeas corpus remedies, just because he has asked the Court to review a minor point of federal appellate practice unrelated to the validity of his state court convictions or five death sentences?

2. Should this Court grant certiorari in a § 1983 action to review the petitioner's claim that electrocution is unconstitutional when the claim is barred by default and was dismissed as frivolous by the Court of Appeals?

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PRELIMINARY STATEMENT

On June 9, 1993, the United States Court of Appeals for the Fourth Circuit entered an order that the district court had entered in Syvasky Poyner's class action suit brought under 42 U.S.C. § 1983. This was the second time in Poyner's case that the Fourth Circuit had been required to reverse an order by the same district court that would have interfered with the execution of a different Virginia prisoner in the name of assisting Poyner's lawsuit. The Fourth Circuit, after examining the record in the case, also directed the district court to dismiss the § 1983 suit with prejudice because it was "entirely without merit." (Pet. App. 69). Poyner petitioned the Court of Appeals for a rehearing en banc on February 2, 1993, but not one judge believed the case even warranted a poll of the full court. The petition therefore was denied on February 17, 1993. (Pet. App. 79). This is the fourth time Poyner has petitioned for certiorari, and he asks for a stay of his execution scheduled for March 18, 1993.

STATEMENT OF THE CASE

1. The Crimes

On January 24, 1984, Poyner entered a hair salon in Hampton, Virginia he had picked at random and, at gunpoint, ordered Joyce Baldwin, the sole employee, to give him her money. Baldwin cried and begged Poyner not to kill her, but he forced her to the back of the store, took her money and then shot her, execution-style, in the back of the head. Poyner v. Commonwealth, 229 Va. 401, 425-426, 329 S.E.2d 815, 832 (1985).

Six days later, Poyner stole a car, drove to nearby Williamsburg and entered a motel that he had picked at random. He then ordered Clara Paulette at gunpoint to give him her money. As she handed over $40 in cash, Chestine Brooks happened to walk in. Poyner ordered Ms. Paulette and Ms. Brooks to turn their backs to him and to face a counter. Even though they followed his orders, Poyner shot both women, execution-style, in the back of the head. Id. at 416, 329 S.E.2d at 826-827.

The next day, Poyner drove past an ice cream parlor in Newport News, Virginia, saw a lone [illegible] "jumped," but handed Poyner about $30 in cash. Ms. Ripple "crouched in a corner in terror" as Poyner shot her in the head. Id. at 421-422, 329 S.E.2d at 836.

Two days later, Poyner abducted Carolyn Hedrick from a Hampton street at gunpoint, forced her into her own car and, while she cried and begged for her life, made her undress, raped her, shot her in the head and dumped her nude body onto a church parking lot. Poyner then drove around in Ms. Hedrick's car selling candy he had found on the back seat. Id. at 426-427, 329 S.E.2d at 833.

When Poyner was arrested two days later, he fully confessed to the crimes. The United States Magistrate Judge who viewed the videotaped confession during Poyner's federal habeas corpus proceeding concluded that "[t]he Court finds that the videotape portrayed petitioner accurately as a cold-blooded murderer." (Resp. App. 2). When the police asked him why he had picked these victims, Poyner explained that women are afraid of guns and are therefore easier to rob than men and that he was following the advice of fellow inmates from past incarcerations who had said they wished they had eliminated their eyewitness-victims. Poyner v. Murray, 964 F.2d 1404, 1408 (4th Cir. 1992). The murder weapon was subsequently found under Poyner's bed. Id.

2. *Poyner's Trials*

Poyner was first convicted in the Circuit Court of the City of Williamsburg and James City County for the capital murders of Chestine Brooks and Clara Paulette during a robbery. In a second trial, he was convicted in the Circuit Court of the City of Hampton for the capital murder of Joyce Baldwin during a robbery and for the capital murder of Carolyn Hedrick during a separate robbery. In a third trial, he was convicted in the Circuit Court of the City of Newport News for the capital murder of Vickie Ripple during a robbery.

Poyner was sentenced to death for each murder based upon a finding in each separate sentencing [illegible] future acts [illegible]. The Hampton murders of Joyce Baldwin and Carolyn Hedrick also were found to be outrageously or wantonly vile, horrible or inhuman in that they involved depravity of mind and torture. Poyner v. Commonwealth, 229 Va. at 422, 424-429, 433, 329 S.E.2d at 830, 832-833, 835.

3. *Direct Appeal*

In a consolidated, automatic appeal, the Virginia Supreme Court affirmed the convictions and death sentences. Poyner v. Commonwealth. This Court denied the three petitions for a writ of certiorari in Poyner v. Virginia, 474 U.S. 865 (1985) (Newport News and Williamsburg), and Poyner v. Virginia, 474 U.S. 888 (1985) (Hampton).

4. *State Habeas*

Poyner's state habeas corpus petitions filed in the three state circuit courts were dismissed by those courts in May of 1987 after extensive briefing and oral argument. The Virginia Supreme Court refused his three petitions for appeal from those judgments in April of 1988. This Court again refused to hear Poyner's case when it denied his three petitions for certiorari to the Virginia Supreme Court's habeas corpus judgment. Poyner v. Barr, 488 U.S. 871 (1988).

5. *Federal Habeas*

Poyner then filed three petitions pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia. The petitions were referred to the United States Magistrate Judge who, after considering the extensive record and pleadings, recommended their dismissal in October of 1989. The district court conducted a de novo review of the Magistrate Judge's report and entered final judgment, dismissing the petitions on December 21, 1990. Poyner's subsequent motion to reconsider was denied by the distr. court on February 15, 1991. On appeal, the Fourth Circuit unanimously upheld the judgments denying federal habeas relief in an opinion that consolidated the three cases. Poyner

Murray, and this Court denied Poyner's third petition for a writ of certiorari on November 2, 1992.

6. The § 1983 Case

Having exhausted all avenues of direct and collateral review of his convictions and sentences, Poyner embarked upon a new tack. On December 10, 1992, he filed a class-action lawsuit in the United States District Court in Richmond pursuant to 42 U.S.C. § 1983 purportedly on behalf of all present and future Virginia capital murderers, alleging that execution in Virginia's electric chair constitutes cruel and unusual punishment because death by electrocution supposedly is painful and not instantaneous.[1] Poyner filed his § 1983 action at approximately 4:00 p.m., just seven hours before a fellow death row inmate was scheduled to be executed. Poyner obtained permission from the district court to appear at 5:00 p.m. to request the court to order the respondents to permit him to videotape the pending execution and participate in the subsequent autopsy.

After orally certifying the class, the district court announced its decision from the bench at 7:15 p.m., which was expressly to mandatorily enjoin the Commonwealth to permit the videotaping of the execution of Timothy Bunch, the Virginia death-row inmate scheduled for execution at 11:00 that night. The district court also enjoined the Virginia Department of Corrections to execute Bunch without the execution mask that is a necessary part of the established procedure in Virginia and directed that Poyner's

[1]Neither the allegations nor "facts" asserted in Poyner's lawsuit were in any sense new. To the contrary, in January of 1992, Herbert Bassette, a Virginia death row inmate represented by one of the same firms who represents Poyner, filed an almost identical § 1983 action in the same federal district court based on affidavits from many of the same experts Poyner relies on. (Resp. App. 81). The district court granted Bassette an evidentiary hearing on his claims, but his lawyers abruptly withdrew the suit with prejudice the night before the hearing, with the only condition being the Commonwealth's agreement not to seek fees against them. (Resp. App. 87). Poyner repeatedly asserts that the Commonwealth has only recently adopted a "two jolt" method of electrocution. (Stay Motion at 9). This simply is untrue: except for two executions during the summer of 1991, the policy of the Department of Corrections is now and always has been to administer "two jolts" of electricity during an execution; indeed, Poyner's own affidavit submitted to the Governor (but not to this Court), shows that the Commonwealth's policy was to administer two jolts of electricity when Frank Coppola was executed in 1982. (Resp. App. 88).

"expert" be permitted to observe Bunch's autopsy. (Resp. App. 4-5). The Commonwealth immediately appealed the district court's order and moved the district court to stay the injunction pending appeal. The district court denied the motion, and the Commonwealth sought a stay of the injunction ordered by the district court and, on the night of December 10, the Court of Appeals stayed the district court's order. (Resp. App. 6-7). Although Bunch, a member of the class, sought stays of his execution in his own habeas proceeding on the basis that Poyner's § 1983 suit was pending, the Commonwealth argued that Gomez v. U.S. District Court, 112 S.Ct. 1652 (1992), precluded the granting of a stay under such circumstances. This Court agreed and denied Bunch's request for a stay of execution. Bunch v. Wright, 113 S.Ct. ___ (Dec. 10, 1992). Despite the fact that Poyner held himself out as the representative of the class, he never sought a stay on behalf of his fellow class member Bunch.[2]

On January 19, 1993, again at Poyner's request, the same district court granted a second injunction that ordered the Commonwealth to allow Poyner's "expert" to participate in the autopsy to be performed on Charles Stamper after his execution scheduled that night.[3] (Pet. App. 56). Upon the Commonwealth's appeal from the injunction, the Court of Appeals again reversed the district court, this time ordering the § 1983 action dismissed with prejudice. (Pet. App. 69). Poyner's petition for rehearing en banc was denied on February 17, 1993. (Pet. App. 79).

7. Execution Date Set

Immediately after this Court denied Poyner's last certiorari petition on November 2, 1992, the Circuit Court of the City of Williamsburg and James City County notified Poyner's lawyers that it intended to set a date of execution and directed them to advise the court of their earliest available dates

[2]Incredibly, Poyner's recitation of the historical facts of his case fails to even mention the actions which both he and the district court took in an attempt to interfere with the Bunch execution.

[3]Poyner sought a stay of Stamper's execution but the Commonwealth argued that Gomez precluded the granting of such a stay. The district court, the Fourth Circuit, and this Court agreed. See Stamper v. Wright, 113 S.Ct. ___ (Jan. 19, 1993).

for a court appearance. (Resp. App. 71). When Poyner's lawyers had not responded by December 8, [illegible] court's request by December 21, 1992. (Resp. App. 72). Poyner's lawyers, however, first filed their § 1983 lawsuit on December 10 and did not comply with the circuit court's request for available dates until December 16, 1992. (Resp. App. 74). On December 21, 1992, Poyner was notified that a hearing date had been set. (Resp. App. 74).

On January 21, 1993, the circuit court held a hearing at which Poyner's lawyers were present (Poyner himself waived any right to be present) and set the date of Poyner's execution for March 18, 1993. (Resp. App. 9). During that proceeding, which was neither a criminal nor a habeas corpus proceeding but rather a statutorily-required mechanism for setting an execution date (see Va. Code § 53.1-232), Poyner unsuccessfully asked the circuit court to postpone the setting of an execution date. Poyner then unsuccessfully asked the court to hold an evidentiary hearing on his electric chair claim before setting a date. On February 25, 1993, Poyner petitioned the Supreme Court of Virginia for an appeal from the order setting an execution date on the ground that he was denied a hearing on his claim. (Resp. App. 17). The Supreme Court of Virginia, however, refused the appeal on March 10, 1993, finding "no merit in [Poyner's] claim that the court below erred in refusing to conduct an evidentiary hearing regarding the constitutionality of Virginia's present method of executing prisoners." (Resp. App. 47).

8. *Present Request For Stay*

In connection with this most recent of his four certiorari applications, Poyner filed a motion for a stay of his execution with the Fourth Circuit on March 12, 1993 -- three months after he initiated his § 1983 action, almost two months after it was dismissed and less than a week before his scheduled execution. (Resp. App. 49). The Fourth Circuit denied the stay on March 13, 1993, finding as follows:

> Substantially all of the facts on which Poyner now relies have been public knowledge and easily available to him at least since the dissenting

> opinion of Justice Brennan in Glass v. Louisiana, 471 U.S. 1080 (April 29, 1985) which in turn relied upon some public [illegible] should have been raised by Poyner in his state and federal habeas petitions...but was not raised until the current Section 1983 case was filed on December 10, 1992.

(Resp. App. 58).

9. *Request for Executive Reprieve*

On March 11, 1993, Poyner filed a petition with the Governor of Virginia in which he sought a reprieve until he could either find a court that would grant him an evidentiary hearing on his claims about the electric chair or until the Governor heard the evidence. The Governor denied the reprieve on March 16, 1993, finding that electrocution was not cruel and unusual punishment and noting that if he believed Poyner's claims he would not have allowed the executions of the ten prisoners whose death sentences had been carried out during his tenure in office. (Resp. App. 90).

POYNER'S PETITION AND MOTION FOR STAY OF EXECUTION SHOULD BE DENIED

There are several reasons, taken together or separately, why Poyner's petition for a writ of certiorari and request for a stay of execution should be denied:

Summary Of Argument

Syvasky L. Poyner, like Robert Alton Harris last year, seeks to use a contrived § 1983 complaint as a basis for obtaining a last-minute stay of his execution. The reasons this Court rejected Harris' transparent attempt to thwart justice apply with even more force here. See Gomez v. U.S. District Court; Vasquez v. Harris, 112 S.Ct. 1713 (1992).

From its inception, the § 1983 class action suit instigated by Poyner has been characterized and driven by two essential [illegible]

Amendment's prohibition against cruel and unusual punishment as it relates to judicially approved

about Poyner's argument is its failure to recognize that a punishment must be both cruel and unusual to violate the Eighth Amendment and that no constitutional requirement that executions be instantaneous exists or has ever existed.

Put simply, Poyner's argument is grounded upon his lawyers' subjective disapproval of execution by electrocution, rather than on what is prohibited by the Eighth Amendment. And, despite what Poyner says he understands, this Court's decision in In Re Kemmler, 136 U.S. 436 (1890), is just the starting point of an Eighth Amendment analysis of execution by electrocution, not its end.

Poyner would have this Court believe that the Court of Appeals did not understand he was attacking the specific use of Virginia's electric chair as well as all executions by electrocution. Ironically, however, what the Court of Appeals recognized, but Poyner refuses to accept, is the simple fact that his two "separate" arguments are indistinguishable in the constitutional sense, regardless of how he characterizes them. This is because what he claims makes executions in Virginia's electric chair unconstitutional is no different from what the courts have long recognized happens during every execution by electrocution. The following statement by a federal district judge in Florida thus applies equally to Poyner's argument: "A federal court is particularly ill-suited to fill the role of the office of master electrician for the electrocution chamber....This is, however, the role in which petitioner would cast the Court." Hamblen v. Dugger, 748 F. Supp. 1498, 1504 (M.D. Fla. 1990).

In sum, as the Fourth Circuit just held on March 13 in denying Poyner's stay request, not only could the petitioner have raised the essential facts he now relies on during his prior habeas proceedings, his unproven claims "even if true are based on no factual premise which would show that the method of Poyner's execution would involve 'cruelty inherent in the method of punishment, not the necessary

suffering involved in any method employed to extinguish life humanely.' Louisiana ex rel. Francis L.

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I

POYNER IS NOT ENTITLED TO A STAY

The Court of Appeals' judgment in the federal § 1983 case that Poyner wants this Court to review cannot adversely affect the judgment of the state court that sentenced him to death or the order of the state court that directed the Virginia Department of Corrections to carry out his sentence on March 18, 1993. Under Rule 23 of the Rules of this Court and 28 U.S.C. § 2101(f), Poyner can seek a stay only of the judgment below, but in this case the "judgment below" did not pertain directly to Poyner's criminal conviction or sentence. The judgment below dealt only with a class-action § 1983 lawsuit. Therefore, even if an appropriate application to stay the enforcement of the judgment below was granted now, that stay could not stop Poyner's execution; it could result only in putting Poyner's § 1983 suit on hold while this Court decided the issues presented in the certiorari petition, i.e., procedural issues pertaining to federal appellate practice which are unrelated to the legality of Poyner's convictions and five death sentences. Indeed, when Poyner appeared before the Virginia Supreme Court on March 8, 1993, to argue orally his petition for appeal from the order setting his execution date, he expressly conceded that he had been properly convicted of his crimes and had no complaint about the validity of his death sentences. A stay of Poyner's execution simply is not authorized in connection with this or any other § 1983 proceeding.

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[4]Poyner's reliance on the fact that the Fourth Circuit referred to his claims as "unproven" not only ignores the fact that the Court of Appeals rejected the claims as inadequate "even if true," but also the that fact his own "pain" expert, Dr. Price, believes that the issue of consciousness during execution is incapable of proof. (Pet. Stay Exh. 13, ¶ 10); see Hamblen v. Dugger, 748 F. Supp. at 1503 (testimony from petitioner's "pain" expert about electric chair characterized as speculation not susceptible to proof in court).

Even if a motion for stay of execution were cognizable, however, Poyner cannot meet the [illegible] state [illegible] interest in preventing abuses of the judicial system designed merely to delay. See Barefoot v. Estelle, 463 U.S. 880, 895 (1983). When a motion for a stay accompanies a second or successive petition, "[t]he granting of a stay should reflect the presence of substantial grounds upon which relief might be granted." Id. If the successive petition is barred under 28 U.S.C. § 2244(b) and Rule 9, Rules Governing Section 2254 Cases, the "substantial grounds' required for a stay do not exist. Delo v. Stokes, 110 S.Ct. 1880, 1881 (1990). See also Sullivan v. Wainwright, 464 U.S. 109, 110-111 (1983) (stay denied where prisoner raised claims that had been "presented several times previously in both state and federal courts and [and] been found to be meritless").

When this standard is applied to Poyner's stay motion, it is clear that it must be denied. Poyner expressly asked the district court to "enjoin the defendants from using electrocution as a method of carrying out death sentences," i.e., he wanted the court to issue, in the guise of a civil injunction, a stay of execution for every member of the class until Virginia adopted a method of execution that suited the district court. As has been obvious from the outset, however, the only execution Poyner is truly interested in staying is his own. But this Court has made clear that a death-row inmate cannot use a § 1983 action as a device to avoid the procedural bars applicable to successive habeas corpus petitions or to obtain a stay to which he otherwise is not entitled.

In Gomez v. U. S. District Court, the lower federal courts had granted California death-row inmate Robert Alton Harris a last-minute stay of execution because he was a member of the class in a § 1983 action filed by fellow death-row inmate Gomez claiming that California's procedure for execution by lethal gas was cruel and unusual in violation of the Eighth Amendment. This Court, however, summarily vacated Harris' stay:

> This case is an obvious attempt to avoid the application of McCleskey v. Zant...to bar this successive claim for relief. Harris has now filed four [illegible] cause for his failure to raise this claim in his prior petitions.

112 S.Ct. at 1653 (citation omitted).

Then, to underscore this ruling, this Court subsequently entered an extraordinary order that "[n]o further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court." Vasquez v. Harris, 112 S.Ct. 1713 (1992). Poyner's strategy is identical to that of Harris and Gomez: by calling his case a § 1983 action, he obviously is attempting to avoid the procedural bars which would preclude habeas corpus relief. But, as the Fourth Circuit concluded on March 13 when it rejected Poyner's last-minute request for a stay, this ploy has no more validity here than it had in Gomez. (Resp. App. 59).

Gomez makes clear that, even if a complaint technically is cognizable as a § 1983 action, an artifice of pleading cannot save the plaintiff from the consequences of his abuse of the judicial system. Poyner's thinly disguised attempt to stay his execution with a claim he deliberately abandoned in a prior unsuccessful collateral proceeding clearly is prohibited from federal court review.[5] Moreover, there are even stronger reasons in Poyner's case to deny a stay than there were in Gomez. The stay in Gomez at least was based upon a pending lawsuit where no determination of the issue had been made, yet this Court still refused to hear Harris' complaint. Poyner's request, on the other hand, lacks even the superficial

[5] In his direct appeal to the Supreme Court of Virginia, Poyner unsuccessfully claimed that execution by electrocution constituted cruel and unusual punishment. See Poyner v. Commonwealth, 229 Va. at 406, 329 S.E.2d at 820-821. He later abandoned this claim, however, by failing to raise it in his first federal habeas corpus petition. And, as the Fourth Circuit has found, the factual bases for Poyner's claim clearly were available when he litigated his state and federal habeas proceedings. (Resp. App. 58). The claim, therefore, is barred by Poyner's abuse of the writ. See Kuhlmann v. Wilson, 477 U.S. 436, 444 n. 6 (1986). This is true even though Poyner relies on subsequent occurrences as "evidence" to support the claim. See McCleskey v. Zant, 111 S.Ct. 1454, 1472-74 (1991); see also Jones v. Whitley, 938 F.2d 536, 542 (5th Cir. 1991) (recent alleged malfunctions of Louisiana electric chair "do not show that it is...any more inhumane than it ever was when previous constitutional challenges were rejected"). Poyner cannot show cause for such a default, and without a showing of actual innocence -- impossible here -- the claim simply is not cognizable. See McCleskey, 111 S.Ct. at 1470.

appeal that the Ninth Circuit apparently found in Gomez. The Fourth Circuit ordered Poyner's "cruel

than seven decisions from this Court have recognized that execution by electrocution is constitutional. Indeed, the Court of Appeals pointed out that "there is no contrary decision." (Pet. App. 76).

This determination that Poyner's § 1983 case is utterly frivolous makes his request for a stay of execution untenable. Further, his lengthy history of litigation coupled with his final, eleventh-hour resort to the subterfuge of a § 1983 action brought solely for the purpose of delay, disentitles him to consideration now. Poyner's effort to coerce a stay out of such an abuse of the legal process must meet the same fate as Robert Alton Harris' equally transparent effort in Gomez.*

II

POYNER HAS ADVANCED NO REASON WARRANTING REVIEW OF THE COURT OF APPEALS' CASE-SPECIFIC DETERMINATION THAT HE COULD NOT POSSIBLY SUCCEED ON THE MERITS OF HIS CLAIM

Poyner would have this Court believe that the district court's repeated attempts to interfere with the executions of other Virginia prisoners at his request were nothing more than mere "discovery" orders entered in the context of Poyner's § 1983 class action. This Court should not be fooled by Poyner's disingenuous argument.

Although Poyner's petition inexplicably fails to even mention the facts of his first attempt to interfere with a Virginia execution, it is important for this Court to understand what the record shows:

*Poyner's attempt to distinguish his case from Gomez must fail. While it is true that Poyner filed his § 1983 suit in December, 1992, he did so only after the trial court had notified him that it intended to set an execution date in the near future. (Resp. App. 71). Poyner then attempted to use the pendency of his federal suit to forestall the state court from setting an execution date. (Resp. App. 75). Thus, just like Harris did in Gomez, Poyner has tried to thwart his execution with a lawsuit that even by his own admission could have been filed years ago. And, regardless of when Poyner filed his § 1983 suit, the fact remains that just like virtually every other death row inmate facing imminent execution, Poyner has waited until the last minute to come to this Court seeking a stay.

on December 10, 1992, when Poyner asked the district court to order the Commonwealth of Virginia to

subsequent autopsy, the district court clearly understood Poyner to be asking for an injunction, not merely discovery. Before the district court read its order from the bench, the court stated that the order "just spells out what is requested," and, both the court's statement from the bench and the order it subsequently entered expressly directed that the Commonwealth was "mandatorily enjoined" to allow the district court's own court reporter to supervise the videotaping of Bunch's execution under conditions dictated by the court. The injunction included a specific directive that Bunch's face must be left uncovered by the mask that is an integral part of the electric chair's headpiece. (Resp. App. 4, 61). Significantly, in the same order granting Poyner's requested injunction, the court directed the Commonwealth to allow Poyner to "have one representative present to observe" Bunch's autopsy. (Resp. App. 5).

Neither before nor after the district court entered its injunction order with respect to Bunch's execution did Poyner dispute the court's characterization of his request as one for an injunction or object to the court's granting of injunctive relief. The record thus demonstrates beyond dispute that both the district court and Poyner viewed the court's December 10 order as an injunction.

When the Commonwealth appealed that injunction to the Fourth Circuit and sought a writ of prohibition, moreover, the Court of Appeals recognized the order for what it was and promptly vacated it. (Resp. App. 6). Poyner made no attempt to seek review in this Court, but when the next Virginia death row inmate was scheduled for execution, Poyner went right back to the same district judge and again asked for permission to videotape the execution and to participate in the subsequent autopsy. In addition, he asked the judge this time to order the Commonwealth to hand over to his expert the condemned man's brain. (Resp. App. 63-68). Having experienced first-hand the power of the Court of Appeals to vacate injunctions, however, Poyner and the district judge were careful to couch Poyner's second request as a discovery motion rather than a request for an injunction. The court [illegible]

on this "discovery motion" at 4:00 p.m., January 15. Then, at about 3:00 p.m. on January 19, 1993, [illegible] designated pathologist to participate in Stamper's autopsy. (Pet. App. 56).

The relief granted by the district court on January 19, at least with respect to the autopsy, thus was far more intrusive than the injunction the court had granted on December 10 because the December 10 injunction merely required the Commonwealth to permit Poyner's representative to observe Bunch's autopsy. The January 19 order, on the other hand, required the Commonwealth to allow Poyner's pathologist to take possession of pieces of Stamper's brain in order to perform experiments in England deemed necessary by Poyner to prosecute his § 1983 action. (Pet. App. 56). The district court ordered this relief, moreover, even though it would have been a violation of Virginia law for Poyner's "expert" to participate in the autopsy. See Va. Code § 32.1-285. Furthermore, the order was entered despite the fact that the court knew Stamper himself had refused to consent to this procedure.

When the Commonwealth again appealed, the Fourth Circuit was not taken in by Poyner's effort to camouflage the district court's injunction. Surely, if Poyner, the district court, and the Fourth Circuit understood the district court's December 10 order to be an injunction requiring the Commonwealth to permit Poyner's representative to observe an autopsy, the true character of the January 19 order granting even more intrusive procedures was not altered merely by the decision of Poyner and the district court to label it as a "discovery" order. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 287-288 (1988); Carlson v. American Brands, Inc., 450 U.S. 79, 83-84 (1981) (practical effect of order governs characterization as injunction).

There can be no doubt, then, that when the Fourth Circuit entered its order on January 19 directing the district court to dismiss Poyner's underlying class action as frivolous, the Court of Appeals was dealing with an extremely intrusive situation which apparently was going to be repeated with every scheduled Virginia execution. All of this occurred, moreover, [illegible]

Commonwealth had filed a dispositive motion to dismiss Poyner's class action which the district court [illegible] authority (perhaps the obligation), not only to vacate the district court's injunction, but also to order the district court to dismiss the underlying, frivolous lawsuit. See Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940) (appellate court may dismiss action if obstacles to success on merits are "insuperable").[7]

The issue of whether in a given case there are "insuperable" impediments to the success of a lawsuit is necessarily a case-specific inquiry. In Poyner's case, because of the exigencies involved in the impending executions of Timothy Bunch and Charles Stamper, the Fourth Circuit closely monitored the pleadings and developments in Poyner's class action from the time the suit was filed on December 10 until January 19 when the Court ordered it dismissed. The Court concluded that in view of all the facts, even the facts as alleged by Poyner, he could not possibly succeed on his claim that Virginia's method of execution by electrocution violates the Eighth Amendment and that allowing the lawsuit to continue would only further strain the interest of federal-state comity which the orders appealed from had so severely tested. Indeed, in its March 13 order denying Poyner's motion for a stay, the Fourth Circuit expressly stated that, even if true, Poyner's complaint could not show an Eighth Amendment violation. (Resp. App. 59).

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[7] The circuit courts of appeals have uniformly followed this same procedure in similar circumstances. Lee v. Ply*Gem Industries, Inc., 593 F.2d 1266, 1268 (D.C. Cir. 1979); Avery v. Secretary of Health and Human Resources, 762 F.2d 158, 161 (1st Cir. 1985); Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67, 70 (2nd Cir.), cert. denied, 385 U.S. 971 (1966); Kershner v. Mazurkiewicz, 670 F.2d 440, 447-448 (3rd Cir. 1982); Allstate Insurance Co. v. McNeill, 382 F.2d 84, 88 (4th Cir. 1967); Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086, 1091 (5th Cir. 1973); Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1370 (6th Cir. 1977); Libertarian Party of Indiana v. Packard, 741 F.2d 981, 990-991 (7th Cir. 1984); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 73-74 (8th Cir. 1976); Lopez v. Heckler, 725 F.2d 1489, 1497 (9th Cir. 1984); Callaway v. Block, 763 F.2d 1283, 1287-1288 n.6 (11th Cir. 1985); Cordis Corp. v. Medtronic, 780 F.2d 991, 993-994 (Fed. Cir. 1985). As the Fifth Circuit has aptly noted, "[o]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." See Mercury Motor Express, Inc., 475 F.2d at 1091.

This Court should defer to the Court of Appeals' resolution of this fact-bound inquiry. After all, [illegible] v. Johnston, 268 U.S. 220, 227 (1925). See also Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J., respecting the denial of certiorari).

III

CERTIORARI SHOULD NOT BE GRANTED BECAUSE POYNER CANNOT PREVAIL EVEN IF THE COURT OF APPEALS WERE REVERSED

As discussed above, the Court of Appeals dismissed Poyner's "cruel and unusual" claim because the "exact question" had been decided adversely to Poyner by every court to consider it. The court's conclusion that "the basic premise in the underlying case in the district court is entirely without merit" was undeniably correct and renders Poyner's certiorari issues completely meaningless.[8]

This Court first held in In Re Kemmler that death by electrocution is not unconstitutional, and has never deviated from that holding. In Louisiana v. Resweber, 329 U.S. 459 (1947), for example, this Court held that the electrocution of a prisoner, after the first attempt to execute him had failed because of a mechanical defect in the electric chair, did not constitute cruel and unusual punishment. And, Justice Brennan, dissenting from the denial of certiorari in Glass v. Louisiana, 471 U.S. 1080 (1985), acknowledged that a "single, unforeseeable accident in carrying out an execution does not establish that the method of execution itself is unconstitutional." Id. at 1085; accord, Estelle v. Gamble, 429 U.S. 97,

[8]An additional reason why certiorari must be denied is that Poyner's underlying § 1983 claim is barred from federal review by the "new rule" doctrine that requires rejection of a claim made in a collateral attack upon a state court proceeding unless it was compelled by precedent existing at the time the state judgment became final. See Graham v. Collins, ___ U.S. ___, 61 U.S.L.W. 4127, 4129 (Jan. 25, 1993). Poyner's petition openly seeks a new rule by expressly asking this Court to overrule its precedents holding electrocution to be constitutional, and no precedent supports, must less compels, the rule he seeks. In view of this insurmountable obstacle to collateral relief, certiorari review would be entirely inappropriate. And, allowing a death row prisoner to obtain § 1983 relief on a claim clearly barred under the "new rule" doctrine would have a devastating impact on the interests the doctrine is designed to protect.

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105 (1976) ("[a]n accident [during an execution], although it may produce added anguish, is not on that [illegible] courts have held without exception that execution by electrocution is constitutional.[9] The Virginia Supreme Court likewise consistently has rejected claims that death by electrocution constitutes cruel and unusual punishment.[10]

Not only is the law uniform with respect to the constitutionality of electrocution in theory, but also in practice. Electrocution is hardly an "unusual" punishment, having been the sole mode of execution in Virginia and other States for almost a century. See Walton v. Arizona, 497 U.S. 639, ___, 111 S.Ct. 511, 539 (1990) (Scalia, J., concurring) (the Eighth "Amendment ... requires a court to consider not only whether the penalty is severe or harsh, but also whether it is 'unusual.' If it is not, then the Eighth Amendment does not prohibit it, no matter how cruel a judge might think it to be."). This Court, moreover, has made clear that any claim challenging a punishment as presently "contrary to evolving standards of decency" must be analyzed not by reference to the personal inclination of judges, or even by reference to "state of the art" technology in executions, but with the deference owed to the decisions of state legislatures under our federal system. Stanford v. Kentucky, 492 U.S. 361, 369-370 (1989); see also McCleskey v. Kemp, 481 U.S. 279, 300 (1987), quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976) ("legislative judgment [about criminal sanctions] weighs heavily in ascertaining contemporary standards"). It is not surprising that Poyner ignores the "unusual" component of the Eighth Amendment because the present wide acceptance of electrocution by the States not only disproves any

[9]See, e.g., Jones v. Whitley, 938 F.2d 536 (5th Cir. 1991); Lowenfield v. Phelps, 817 F.2d 285 (5th Cir. 1987), aff'g, 671 F.Supp. 423 (E.D. La. 1987); Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987); Lindsey v. Smith, 820 F.2d 1137 (11th Cir. 1987); Funchess v. Wainwright, 788 F.2d 1443 (11th Cir. 1986); Johnson v. Kemp, 759 F.2d 1503 (11th Cir. 1985).

[10]Stockton v. Commonwealth, 241 Va. 192, 402 S.E.2d 196, cert. denied, 112 S.Ct. 280 (1991); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980); Hall v. Commonwealth, 131 Va. 777, 109 S.E. 582 (1921).

claim that electrocution is an "unusual" punishment in the constitutional sense, but also destroys any claim

prove national consensus in his favor).

Notably, Poyner's argument that the Court of Appeals' decision would exempt from constitutional review an execution by "car batteries" only highlights his fundamental misunderstanding of the Eighth Amendment. (Ptn. at 32). Electrocution by "car batteries" would be "unusual" and therefore satisfy one of the prongs of an Eighth Amendment claim. It is precisely because the electric chair has for over a century been the "usual" method (indeed the only method) of carrying out judicial electrocutions in States that provide for electrocution, however, that Poyner's "car battery" hypothetical is so spurious. His exaggerated reaction to the Court of Appeals' decision only emphasizes the weakness of his argument.

Poyner's circular argument, moreover, also demonstrates its lack of merit. Poyner complains that the particular method of electrocution used in Virginia, as distinguished from electrocution in general, is unconstitutional. In reality, however, the "facts" alleged by Poyner about electrocution in Virginia are no different from the "facts" he alleges with respect to electrocutions in general; indeed, they are no different from the facts of electrocutions in other States which have been considered by the courts and which without exception have been found inadequate to establish "cruel and unusual punishment" as defined under Eighth Amendment jurisprudence.[12]

In the final analysis, whether Poyner couches his claim as one attacking execution by electrocution in general or executions in Virginia's electric chair alone, the result is the same. In his stay

[11]According to the United States Department of Justice bulletin, "Capital Punishment 1991," 12 of the 36 States with capital punishment authorize electrocution as the method of execution, making it the second most commonly used method. (Resp. App. 70).

[12]See, e.g., Squires v. Dugger, 794 F. Supp. 1568 (M.D. Fla. 1992); Thomas v. Jones, 742 F. Supp. 598 (S.D. Ala. 1990); Ritter v. Smith, 568 F. Supp. 1499 (S.D. Ala. 1983), aff'd, 726 F.2d 1505 (11th Cir. 1984); Hamblen v. Dugger, 748 F. Supp. at 1503 (prisoner's attempt to distinguish his claim that Florida's electric chair was unconstitutional from a per se claim of unconstitutionality was rejected, and the testimony of his "pain" expert was characterized as "speculation" not susceptible to proof).

request to the Fourth Circuit, Poyner admitted that the most that his supposed evidence shows is that "it

neither instantaneously killed nor rendered instantaneously 'unconscious' by the electric current applied to his body." (Resp. App. 52). The Constitution, however, does not require an execution that causes instantaneous death; the Constitution only requires that the State refrain from the unnecessary and wanton infliction of pain, which Poyner did not allege below, much less show. See Resweber, 329 U.S. at 464; Wilson v. Seiter, 111 S.Ct. 2321, 2324 (1991) (Eighth Amendment requires inquiry into prison official's state of mind); Whitley v. Albers, 475 U.S. 312, 320-321 (1986) (suffering must have been inflicted maliciously and sadistically for the very purpose of causing harm). This, then, is the simple answer to Poyner's entire argument.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari and motion for a stay of execution should be denied.

Respectfully submitted,

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